

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

In the matter of the petition of)	Utility Division
Bonneville Power Administration)	Docket No.
for Declaratory Order)	D2007.3.32
disclaiming jurisdiction)	
)	DECLARATORY
)	RULING

DECLARATORY RULING
DISCLAIMING JURISDICTION

Introduction and Procedure

1. On March 30, 2007, Bonneville Power Administration (BPA) filed with the Montana Public Service Commission (commission) a Petition for Declaratory Order Disclaiming Jurisdiction (Petition).

2. BPA will be constructing in the Pacific Northwest various, as of yet undetermined, transmission facilities including system replacements, upgrades, and additions to be put into service, and primarily affecting existing transmission infrastructure ranging from 69 kV to 1000 kV (the facilities). Some of the facilities will be located in Montana. The facilities will be financed by a special purpose entity owner lessor (the Owner Lessor) and acquired, constructed and/or installed by BPA pursuant to a construction agency agreement between the Owner Lessor and BPA.

3. On April 6, 2007, the commission issued a Notice of Petition of Bonneville Power Administration for Declaratory Order and Opportunity to Submit Comments (Notice). The Notice invited interested persons to submit comments upon the matter posited by BPA and established May 2, 2007 as the deadline for submission of any such comments. The Notice further informed the public that, pursuant to ARM 1.3.227(4)(c), the commission did not contemplate convening a hearing in the docket unless good cause is shown therefore. No comments or any other pleadings were received by the commission in response to the Notice.

4. The commission has adopted the Attorney General's Model Procedural Rules governing declaratory ruling requests. See ARM 38.2.101 and ARM 1.3.226 through 1.3.229. BPA's Petition will be processed under the aforementioned ARM provisions as well as 2-4-501, MCA.

Questions Presented

5. BPA seeks a declaratory ruling by the commission addressing whether the Owner Lessor is exempt from commission regulation as a public utility under 69-3-111, MCA.

Additionally, BPA requests a declaratory ruling that 69-3-101; 69-3-102 and 69-3-111 of the Montana Code Annotated do not apply to the Owner Lessor.

Further, BPA seeks a declaratory ruling that the Owner Lessor in the proposed lease financing is exempt from the definition of "public utility" under 69-3-101, MCA, and is therefore not subject to commission jurisdiction under 69-3-102, MCA.

Factual Background

6. BPA is an agency of the United States government. It is a federal power marketing administration that markets wholesale and interstate electrical transmission services. It operates electrical power transmission facilities in the Pacific Northwest, including facilities within the state of Montana.

7. The facilities referenced in paragraph 2 above will be put into service over time and all facilities will be used exclusively by BPA to provide interstate transmission service and will not be available for use for bundled retail service. It is possible that certain facilities lower than 69 kV may be financed in cases of voltage step-ups of generation and station service to generating stations, but the facilities will not otherwise be used in support of service that may possibly be designated as distribution service.

8. The facilities will be constructed, installed and/or acquired for the purposes of enhancing Northwest transmission grid (grid) reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the grid and managing grid congestion. The facilities will be constructed or installed on real property or real property easements or similar rights held by BPA on land that is owned by a variety of parties, both private and governmental.

9. The facilities will be financed by the Owner Lessor, a special purpose entity. The facilities will be owned by the Owner Lessor, special purpose entity Northwest Infrastructure Financing Corporation II, a Delaware corporation which will be formed expressly for the purpose of arranging for the acquisition and financing of the facilities.

10. All of the capital stock of the Owner Lessor will be owned by JH Holdings, not individually but acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation (JHM), a Massachusetts corporation, as grantor, and JH Holdings Corporation, a Massachusetts corporation (JHH), as trustee. All of the capital stock of JHM and JHH will be owned by The 1960 Trust, an independent charitable support organization qualified under 501(c)(3) of the Internal Revenue Code and operated for the benefit of Harvard University.

11. The Owner Lessor will initially finance the acquisition and construction of the facilities through one or more bank loans. The Owner Lessor's sole source of

funds to repay the loans will be payments made by BPA under the lease of the facilities to BPA.

12. The Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the facilities. The Owner Lessor and BPA will execute a master lease that will govern and incorporate from time to time separate individual lease commitments between BPA and the Owner Lessor for related facilities (collectively, the lease). Under the lease, the Owner Lessor will lease its undivided interest in each of the facilities to BPA at the time each such facilities is acquired, installed, and/or constructed. Pursuant to the lease, BPA will acquire a leasehold interest in and possession of the facilities from the Owner Lessor; the term of the lease will be seven years from the date that the master lease and the first lease commitment are executed.

13. BPA will agree in the lease to operate and maintain the facilities in the same manner as it operates and maintains its other transmission facilities. The Owner Lessor will have no operating responsibilities or control rights with respect to the facilities under the lease or any other agreement. The lease will not impede the ability of BPA to transfer operational control over the facilities to a regional transmission organization.

14. BPA asserts that during the term of the lease, the Owner Lessor will have a mere passive interest in the facilities. The Owner Lessor will own the legal title to the facilities, but BPA states that it will have dominion and control over the facilities during the lease term. BPA further states in the Petition that the Owner Lessor and/or its affiliates will not be in the business of producing, selling, or transmitting electric power, either from the facilities or otherwise.

15. At the conclusion of the lease, BPA will have the following options: (a) purchase each facility for \$10.00, (b) renew the lease for a term of one year for a nominal annual rental payment, or (c) remove the facilities at its own expense, or (d) execute a new lease if and to the extent the Owner Lessor assigns the lease to another passive owner. At the expiration of the lease term, the Owner Lessor would not reacquire the facilities; rather, the Owner Lessor would have its interests in the facilities terminated in the event BPA purchases or removes the facilities, would merely retain its passive interest in the event BPA renews the lease, or would assign its interests to another passive owner.

Ruling Analysis

16. In Montana, the term "public utility:"
- (1) ...shall embrace every corporation, both public and private, company, whatsoever, that now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other

persons, firms, associations, or corporations, private or municipal:

(a) heat;

....

(c) light;

(d) power in any form or by any agency;

...

(2) The term 'public utility' does not include:

...

(c) a person exempted from regulation as a public utility as provided in 69-3-111.

Section 69-3-101, MCA

17. If a business is deemed a public utility, the commission has jurisdiction over its regulated activities. Section 69-3-102, MCA provides:

The commission is hereby invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation, and control of such utilities by any municipality, town, or village.

18. BPA seeks a ruling addressing whether the Owner Lessor is exempt from commission regulation as a public utility under 69-3-111, MCA, which provides in relevant part:

(1) Upon application, the commission, by order, may determine that any person not otherwise a public utility is not a public utility subject to the jurisdiction, control or regulation of the commission under this title, solely because such person owns or controls any plant or equipment, any part of or undivided interest in a plant or equipment or any water right described in 69-3-101:

(a) which is leased or sold or held for lease or sale to any public utility or other lessee; or

(b) the operation and use of which is vested by lease or other contract in a public utility or other lessee; or

(c) for a period of not more than 90 days after termination of any lease or contract described in subsection (1)(a) or (1)(b) or after such person gains possession of such property following a breach of such lease or contract."

19. In Montana, the test to determine public utility status is:

...whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product

or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals ...

Lockwood Water Users Ass'n v. Anderson, 168 Mont. 303 (1975), 542 P.2d 1217.

20. BPA asserts that the Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the facilities. Under the terms of the lease, BPA will operate and maintain the facilities and the Owner Lessor will have no operating responsibilities or control rights with respect to the facilities under the lease. The Owner Lessor will have legal title to the facilities, but BPA will have dominion and control over the facilities during the lease term. The Owner Lessor and/or its affiliates will not be in the business of producing, selling, or transmitting electric power, either from the facilities or otherwise. Under these circumstances, the Owner Lessor is not holding itself out to provide a public utility service to electricity end-users in Montana. The Owner Lessor would therefore not be a "public utility" under 69-3-101, MCA. As the Owner Lessor would not be a Montana public utility, the Owner Lessor would be exempt from application of the provisions of 69-3-102, MCA.

21. Moreover, the facilities will not be available for bundled retail service in Montana; rather, the facilities will be constructed, installed and/or acquired for the purposes of enhancing grid reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the grid, and managing grid congestion.

Section 201 of the Federal Power Act, 16 U.S.C. 824, as amended (FPA), states that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce:

(b) Use or sale of electric energy in interstate commerce.

(1) **The provisions of this subchapter shall apply to the transmission of electric energy at wholesale in interstate commerce**, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy**, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in the local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. (emphasis added)

Under these circumstances, the facilities are not dedicated to providing retail electric services to electricity end-users in Montana; rather, the facilities will be used

by BPA to provide transmission service which, under section 201 of the FPA, is under the exclusive jurisdiction of the FERC.

22. Lastly, the commission finds that the provisions of 69-3-111, MCA describe the contemplated traits and activities of the Owner Lessor. The Owner Lessor will possess legal title to the facilities, but is required to lease the facilities to BPA under its articles of incorporation. With no operational responsibilities, and the control and operation of the facilities vested in BPA, ownership alone does not render the Owner Lessor to classification as a Montana public utility. The Owner Lessor is not a public utility under 69-3-111, MCA, subject to the jurisdiction of the commission.

DECLARATORY RULING

1. The Owner Lessor in the proposed lease financing arrangement described by BPA in its request for a declaratory ruling would be exempt from the definition of "public utility" under 69-3-101, MCA.

2. The provisions of 69-3-102, MCA would not apply to the Owner Lessor in the proposed financing arrangement described by BPA in its request for a declaratory ruling as the Owner Lessor would not be a Montana public utility subject to the provisions of Title 69, MCA.

3. The Owner Lessor in the proposed lease financing arrangement described by BPA in its request for a declaratory ruling would not be a Montana public utility pursuant to the provisions of 69-3-111, MCA.

Done and dated this 15th day of May, 2007, by a vote of 4 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

/s/ Greg Jergeson

GREG JERGESON, Chairman

/s/ Doug Mood

DOUG MOOD, Vice Chairman

/s/ Brad Molnar

BRAD MOLNAR, Commissioner

/s/ Robert H. Raney

ROBERT H. RANEY, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

11-6/7/07

Montana Administrative Register